



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 5, 2003

Ms. Sylvia Borunda Firth
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2003-1420

Dear Ms. Firth:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177425.

The City of El Paso (the "City") received a request for "[m]emoranda, correspondence, and other written communication concerning a proposed tax abatement or abatements for Diario de Juarez ("Diario")." You assert the requested information is excepted from disclosure under sections 552.107 and 552.131 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

You contend section 552.107 of the Government Code excepts Exhibit B from disclosure. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act

in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. The mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain “the communication identified as ‘Exhibit B’ has been made in confidence and in the furtherance of the attorney . . . rendering professional legal services to the City of El Paso.” Based on your argument and a review of Exhibit B, we agree most of the information constitutes communications made for the purpose of facilitating legal services. However, we note you have failed to identify the parties to the communications in the submitted information. *See* Open Records Decision No. 676 at 8 (2002) (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made only among categories of individuals identified in Rule 503). Nevertheless, after reviewing the submitted information, we have ascertained the identities of some of the parties privy to the communications. Accordingly, with the exception of the information we have marked, the City may withhold the information in Exhibit B under section 552.107(1) of the Government Code.

Next, we consider whether section 552.131 of the Government Code excepts the remainder of Exhibit B and Exhibits C and D from disclosure. Section 552.131 provides as follows:

- (a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. To establish the applicability of section 552.131(a)(2), the City explains, "Exhibit 'C' contains financial information regarding the operation of the applicant which would cause substantial competitive harm if released." We find the City's argument conclusory - merely a generalized allegation. Moreover, the City has not made a specific factual or evidentiary showing that release of the information would result in substantial competitive injury to Diario. *See* Gov't Code § 552.131(a)(2). Consequently, we conclude the City may not withhold Exhibit C based on section 552.131(a)(2) of the Government Code.

However, you also assert section 552.131(b) excepts certain information from disclosure. You inform us the City currently is involved in economic development negotiations with Diario that include discussions of an incentive. You state the City and Diario have yet to reach an agreement. Based on your argument and our review of the information, the City may withhold the information we have marked in Exhibit D from disclosure pursuant to section 552.131(b) of the Government Code. However, the nondisclosure protection provided by section 552.131 ends once the City finalizes an agreement with the business prospect. Gov't Code § 552.131(c). The City may not withhold the documents we have marked for release in Exhibit B or the remaining information in Exhibit D under section 552.131(b) because they do not contain information about a financial or other

incentive that “is being offered to the business prospect” by the City. See Gov’t Code § 552.131(b).

In summary, with the exception of the information we have marked for release, the City may withhold Exhibit B under section 552.107(1) of the Government Code. Also, the City may withhold the information we have marked in Exhibit D under section 552.131(b) of the Government Code. The City must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 177425

Enc: Submitted documents

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